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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
SERAFIN PENA, L. Z. AND M. Z. FARWELL, and Jose Garcia, et al., appellees.
No. 293.

APPEAL FROM COURT OF PRIVATE LAND CLAIMS.

BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL.

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BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL.

The first ground of the appellee's motion is that the appeal on behalf of the United States was not taken within the time required by law; that is, that the decree was entered in the Court of Private Land Claims on December 1, 1896, and the government's appeal was not allowed until April 14, 1898.

The second ground stated is that, although the law providing for appeals on behalf of the United States from decisions of the Court of Private Land Claims saved to it the right of appeal to this court for six months after

the receipt by the Attorney-General of the report of the United States attorney for the Court of Private Land Claims, in case such report was not received by him within sixty days after the entry of the decree, it appears by the record that the report was not received by the Attorney-General until March 25, 1898, and that, therefore, the government had waived its right of appeal.

The third ground stated is that there does not appear in the record any assignment of errors or prayer for reversal as required by sections 997 and 1012, Revised Statutes of the United States.

The fourth ground stated is that the Court of Private Land Claims consists of a chief justice and four associate justices, and that the allowance of appeal to the United States and citation thereon was not signed by the chief justice of said court, but by Wilbur F. Stone, one of the associate justices thereof, he having no right or power to do so.

I.

The allowance of appeal, the citation, and the certificate of the Attorney-General show that this appeal is within the letter of the law.

Upon the entry of the decree by the Court of Private Land Claims, it appears that the plaintiffs in the three cases involving this one claim, which were ordered consolidated and tried as one by the court (R., 424–25), prayed, and were allowed an appeal (R., 145); that thereafter, on January 15, 1897, a citation directed to the United States, unnecessarily sued out by plaintiffs' counsel, was signed by Wilbur F. Stone, associate justice

of the Court of Private Land Claims (R., 147), and the same was served by the United States marshal for the Territory of New Mexico on William H. Pope, special assistant to the Attorney-General for the prosecution and defense of cases pending in the Court of Private Land Claims, on January 18, 1897 (R., 147).

The report of the United States attorney in this case was not made to the Attorney-General until March 9, 1898, and was not received by him until March 25, 1898 (R., 150).

Upon the application of the United States attorney, Mr. Associate Justice Stone allowed an appeal on behalf of the government, and citation was signed by him on March 9, 1898 (R., 147, 148).

Thereafter, on April 14, 1898, another citation was signed by Mr. Associate Justice Stone, on the application of the United States, covering all the claimants in the consolidated causes Nos. 99, 153, and 233 in the Court of Private Land Claims, service of which was acknowledged on April 20, 1898, by attorneys representing all the claimants before the court (R., 149, 150), and the same was filed in the office of the clerk of the Court of Private Land Claims on the same day (R., 150). It is shown by this application and allowance that the report of the United States attorney in the case had not been received by the Attorney-General within sixty days next after the entry of the decree, but that it was made on March 9, 1898, and received by him on March 25, 1898 (R., 148–50).

The transcript was furnished the Attorney-General, and by proper indorsement thereon he directed that it be

filed with the clerk of this court, which was done on May 5, 1898 (R., 150).

So that, on the face of the record at least, the appeal in this case is within the letter of the law in reference to appeals from the Court of Private Land Claims to this court,—that is, the statement in writing, which by section 9 of the act creating the Court of Private Land Claims (26 Stats., 854) is to be made to the Attorney-General by the United States attorney, was not received by him within sixty days next after the rendition of judgment, and hence, the right of appeal on behalf of the government continued until the expiration of six months after the receipt of such report.

The action of the United States attorney in not making his report to the Attorney-General within the sixty days after rendition of judgment, was approved by the Attorney-General; the reasons for the delay were stated to him and this course received his approval. It would seem, therefore, that the conduct of the United States attorney in the matter of his report in this case had passed the review and received the approval of the only authority authorized by law to determine the propriety of the action of the United States attorney.

The statute evidently contemplated that cases might arise wherein the United States attorney would fail to report within the period, and the Attorney-General receive the same within the sixty days after the entry of the decree, and it is not unreasonable to assume that the act also contemplated the protection of the interests of the United States under many supposable conditions. As will be referred to later on, the wisdom of Congress

in providing that the right of appeal should not be lost to the government until after the report of the United States attorney had been in the hands of the Attorney-General, will be demonstrated by the circumstances of the present case.

The decree in this case was entered on December 1, 1896, (although the date of its entry is not set forth in the record); the report of the United States attorney was received by the Attorney-General on March 25, 1898, (R., 148–150); the final allowance of appeal and citation was signed by Mr. Associate Justice Stone on April 14, 1898, and filed in the office of the clerk of the Court of Private Land Claims on April 20, 1898 (R., 149, 150), very considerably within the period of six months from the date of receipt by the Attorney-General of the report of the United States attorney. It would, therefore, appear that the appeal of the government in this case is within the letter of the law.

II.

The United States attorney for the Court of Private Land Claims has no authority to waive, nor power to forfeit, by any act of his, the right of appeal on behalf of the government; consequently, even had it been withheld for that express purpose, the failure of the United States attorney to report to the Attorney-General within sixty days after the rendition of judgment, as provided by section 9 of the act, does not deprive the government of any of its rights. The only official of the government who has authority to waive its right of appeal, or by his act to forfeit it, is the Attorney-General.

In order that the court may understand that the course pursued by the United States attorney with reference to his report in the case, which was subsequently ratified and approved by the Attorney-General, does not merit the criticism which counsel accords it in his brief, and instead of growing out of neglect, was of studied purpose designed to meet just such a condition of affairs as afterwards arose, the following circumstances are called to the attention of the court.

The decree entered by the Court of Private Land Claims in this case on December 1, 1896, confirmed in part and rejected in part the land sued for. In open court an appeal was prayed by the claimants and allowed as part of the decree (R., 145), and subsequently that appeal was properly prosecuted in this court to the extent of printing the record at a very large expense to them, and was placed on the docket of this court for the October term, 1897, as No. 307, *L. Z. and M. Z. Farwell, appellants*, v. *The United States*. At the time the decree was entered in the trial court and the appeal taken, there were pending on appeal in this court from the Court of Private Land Claims three cases involving fundamental legal questions pertinent to this case, and decisions in which would very materially affect and determine the ultimate result of this appeal, and whether the government would be justified in prosecuting an appeal on its behalf in the present case. These cases were: *United States* v. *Santa Fe* (165 U. S., 715); *United States* v. *Sandoval, San Miguel del Bado Grant* (167 U. S., 278), and *Rio Arriba, etc., Co.* v. *United States, Cañon de Chama Grant* (167 U. S., 298), involving the status of the titles

to lands which were alleged to have been granted or set aside for the formation of cities, towns, and communities under Spanish and Mexican laws. (See petition on which the case was tried, R., 1–6). If the government's contentions were substantially sustained, then the grant involved in the appeal by the plaintiffs would not be entitled to confirmation at all. Were the contrary view taken by this court in said cases, then the claimants in the present case might be entitled to a confirmation of their grant to the extent of the boundaries actually found by the court, not exceeding, however, a total quantity of 11 square leagues.

Under the provisions of section 9 of the act creating the Court of Private Land Claims (26 Stats., 854), when either party shall appeal the case to this court, all questions of law and fact presented by the record or involved in the cases are open for determination by it. The same section provides that the court shall try the case *de novo*, may amend the proceedings below as truth and justice may require, and its decision shall be final and conclusive. Although the provisions of this section were held in the case of the *United States* v. *Coe* (155 U. S., 76) not to be mandatory upon this court, yet, owing to the general powers of the court, relieved in their construction and application so far as this special act is concerned, the case was left open by the act itself for such proceedings and such determination as this court in its wisdom might deem proper. Bearing this provision in mind, it may be seriously doubted whether the *ex parte* dismissal of their appeal by the Farwells alone, without notice to or consent of co-appellants or the United States

should have been allowed, and probably would not, had the attention of this court been called to the condition of the record.

There were three distinct petitions filed in the Court of Private Land Claims, praying for a confirmation of this grant, and the said cases were consolidated and tried as one (R., 24, 25), as they all involved the validity of the same grant. The appeal allowed in open court, and embodied in the decree of confirmation (R., 145), was necessarily allowed to all the claimants in the three cases consolidated, and all were appellants in case No. 307, October term, 1897, referred to. It seems, however, the Farwells, claimants in one of the three cases consolidated, filed their motion to dismiss the appeal, which was allowed on February 21, 1898. This motion and its indorsements are as follows:

In the Supreme Court of the United States, October term, 1897. Term No. 307.

L. Z. AND M. Z. FARWELL, appellants, v. THE UNITED STATES.	Case No. 16493. Appeal from the Court of Private Land Claims.

Now come the above appellants, L. Z. and M. Z. Farwell, by Edward L. Bartlett, of Santa Fe, New Mexico, their solicitor, and say that they will not further prosecute their said appeal in said case, and pray that the same may be dismissed.

L. Z. AND M. Z. FARWELL,
Appellants.

By (signed) EDWARD L. BARTLETT,
Their Solicitor.

(Endorsed:) Case No. 16493. Supreme Court U. S., October term, 1897. Term No. 307. L. Z. and M. Z. Farwell, appellants, vs. The United States. Authority of appellants to dismiss appeal. Office Supreme Court U. S. Filed Feb. 18, 1898. James H. McKenney, clerk.

The record was printed by the appellants, and possibly may have been paid for by Farwell, but nothing appears to show any authority on the part of the Farwells or their counsel to represent the other appellants and plaintiffs below. The question as to whether the appeal by the plaintiffs below is not still in this court will be noticed later.

Believing the appeal properly lodged here by the plaintiffs could not be dismissed as a matter of right, especially under the form of the decree of confirmation, yet if the decision of the fundamental questions involved in the three cases before mentioned should sustain the government's theory, and it should afterwards be determined by the appellants to dismiss their appeal to avoid the effect thereof and this court should hold they were so entitled, the rights of the government could be protected by a report then being made to the Attorney-General and prosecution of an appeal on its behalf under his direction and with his approval. No report was made in writing until March 9, 1898, and received by the Attorney-General March 25, 1898 (R., 148–150).

It is proper to observe the dismissal of the appeal by two of the appellants (Farwells) was filed on February 18, 1898, and under the usual practice called to the attention of the court by the clerk and dismissed on February 21, 1898.

No motion or suggestion was made to this court looking to the reinstatement of the original appeal; but deeming the fair and substantial rights of the government as well as the claimants could best be preserved by taking the course adopted by the United States attorney, which action was approved by the Attorney-General, the report was made, the appeal allowed, and citation issued and served upon attorneys of record of all the plaintiffs below, and filed with the clerk, all within sixty days after dismissal by the Farwells, much to the discomfort and disappointment of counsel for L. Z. and M. Z. Farwell.

That the United States attorney correctly construed his duty under the circumstances is demonstrated by the action of appellees (Farwells) in now seeking to have the government's appeal dismissed.

The circumstances and reasons for the delay in making the report by the United States attorney are proper matters to be submitted to the Attorney-General.

It is evident Farwell's counsel was not solicitous about the performance of the duty of the United States attorney, so as to foreclose any right of appeal on its part, before he undertook to avoid the effect of the decisions of this court in the Santa Fe, San Miguel del Bado, and Cañon de Chama grants, otherwise he might have inquired of the Attorney-General whether the report had been made, and if not the reasons therefor, and he no doubt would have been informed. He would also have been informed that the appeal then pending in this court by his clients and others must be presumed to have been taken and prosecuted in good faith, and under it all ques-

tions should be determined, both of law and fact, and such a decree entered "as truth and justice may require;" and that his clients could not be prejudiced, unless they assumed to avoid the consequences involved in their appeal by obtaining a dismissal without notice to, and an opportunity to be heard in opposition by, the United States, in which case the appeal would be taken by the United States very promptly.

Those having in charge claims in which decrees of confirmation have been entered need not suffer by any failure or neglect on the part of the United States attorney to report, when they are satisfied with the decree and are not seeking or desirous of modifying the same by this court on appeal.

At the end of the six months after entry of the decree, they can apply to the clerk for a certification of the decree to the Commissioner of the General Land Office and upon failure or neglect to do so, their way is clear to the Attorney-General for peremptory direction to the United States attorney. The criticism on the action of the United States attorney comes too late to avail the Farwells anything and enable them to avoid the safegnard attempted to be secured within the law by the representatives of the government.

The fundamental questions involved in this case having been determined substantially in accordance with the theory of the government in the Santa Fe, etc., cases, the unexpected but anticipated partially happened. The appeal taken by the plaintiffs below was dismissed by two appellants without notice to their co-appellants or the United States (appellee).

It is submitted that the United States attorney properly construed his duty in this case, the Attorney-General has approved his action, and the real effect of this appeal is to bring L. Z. and M. Z. Farwell before this court for final determination of their rights, if any, to any portion of the Petaca grant; the other claimants are still before this court on their appeal, not having asked or moved that the same be dismissed.

If the United States attorney has misconstrued his duty, and this appeal, under the circumstances, although within the letter of the law, should be dismissed, still it is contended the appeal on behalf of the other plaintiffs below is still here and should be reassigned to the docket and the dismissal by the Farwells should be set aside.

Section 9 of the act is as follows:

> SEC. 9. That the party against whom the court shall in any case decide—the United States, in case of confirmation of a claim, in whole or in part, and the claimant, in case of the rejection of a claim, in whole or in part—shall have the right of appeal to the Supreme Court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy, as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States. On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the Supreme

> Court thereon shall be final and conclusive. Should no appeal be taken as aforesaid the decree of the court below shall be final and conclusive. * * *

It is insisted that no cross-appeal was necessary under this section. An appeal properly lodged in this court either by the claimants or the United States vested this court with jurisdiction of the subject-matter and persons to be proceeded with in conformity with the provisions of the act and the rules of this court. The confirmation was for part only of the claim and was a rejection of a part, so that both were entitled to an appeal; but the claimants having taken their appeal in open court, and properly perfected it, there can be no good reason why the United States should also appeal.

It was not necessary for the United States to take a cross appeal in order to avoid the effect of the confirmation of a part of the claim. Nor would it have been necessary, had the United States appealed, for the claimants to have prosecuted a cross appeal to avoid the effect of the rejection of a part of the claim.

> SEC. 9. * * * On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the Supreme Court thereon shall be final and conclusive. Should no appeal be taken as aforesaid the decree of the court below shall be final and conclusive. * * *

It is, therefore, respectfully submitted the appeal originally prosecuted by the claimants is still pending, and

as to L. Z. and M. Z. Farwell, it was improperly dismissed and should be set aside and the case reassigned to the docket or the case proceed under the appeal by the government.

III.

The third ground assigned for dismissal of the appeal is "that in the said transcript there does not appear any assignment of errors or prayer for reversal as provided for in Revised Statutes United States, sections 997 and 1012."

The statement of the proposition carries on its face a misconception by counsel of the offices performed by writs of error and appeals in their technical sense, and particularly where the decree to be reviewed was entered "according to the practice of courts of equity of the United States." See sections 7 and 9, act of March 3, 1891 (26 Stats., 854).

Moreover, the court has so settled the practice on this point, under Rule 21, that it is not deemed proper further to consider it.

IV.

The fourth ground urged for dismissal of the appeal (third on counsel's brief, p. 8) is:

> The Court of Private Land Claims, from which this appeal is attempted to be made, consists of a chief justice and four associate justices. (See section 1 of the act establishing this court.) The appeal in this case was allowed and the citation signed by Wilbur F. Stone, one of the associate justices, and not a *presiding judge* (Transcript, p. 149). This was not a compliance with section 999 of the Revised Statutes.

Counsel seems again to misapply the provisions of section 999, Revised Statutes of the United States, 1878, and must have overlooked the decisions of this court in the cases of *Sheppard et al.* v. *Wilson* (5 How., 210); *Rodd* v. *Heartt* (17 Wal., 354), and especially the case of *Brown* v. *McConnell* (124 U. S., 489), which is conclusive of the question.

It is contended—

First. That the motion by L. Z. and M. Z. Farwell (only two of the appellants) to dismiss this appeal should be denied.

Second. That, if the motion to dismiss this appeal should be granted, the dismissal of appeal at the instance of L. Z. and M. Z. Farwell, allowed on February 21, 1898, should be set aside and the original appealed case assigned to the docket for argument in lieu of No. 293, October term, 1898.

Third. That if the court should dismiss this appeal and decline to set aside the dismissal of appeal by L. Z. and M. Z. Farwell, filed February 18 and allowed February 21, 1898, still the court should order the case reassigned to the docket for argument, as it does not appear that other appellants and plaintiffs below suggested a dismissal of their appeal, nor is it suggested that counsel for L. Z. and M. Z. Farwell represented or pretended to represent the other appellants.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.